

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

SHERRY GAINES, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

NATIONAL WILDLIFE FEDERATION,

Defendant.

Case No. 4:22-cv-11173-FKB-CI

Hon. F. Kay Behm
Mag. Curtis Ivy, Jr

**PLAINTIFF'S CORRECTED MOTION FOR LEAVE TO FILE A
NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff, individually and on behalf of all others similarly situated, files this Corrected Motion for Leave to File a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 21) to Defendant's Motion to Dismiss (ECF No. 18):

1. On March 3, 2023, Magistrate Judge Kimberly G. Altman issued a Report and Recommendation to Deny Defendant's Motion to Dismiss and Motion to Certify Question in *Briscoe v. NTVB Media Inc.*, Case No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023). Case Attached as 1-A.

2. In *Briscoe*, Magistrate Judge Altman rejected many of the same arguments raised by the Defendant in its pending Motion to Dismiss. Specifically:

a. Magistrate Judge Altman expressly declined to follow *Nashel v. New York Times*, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022) and *Wheaton v. Apple Inc.*, 2019 WL 5536214 (N.D. Cal. Oct. 25, 2019), and instead held that *Horton v. GameStop Corp.*, 380 F. Supp. 3d 679 (W.D. Mich. 2018) and *Piper v. Talbots, Inc.*, 507 F. Supp. 3d 339 (D. Mass. 2020) were "more persuasive." *Briscoe* at PageID.2693-2698. Accordingly, Magistrate Judge Altman held that the operative complaint in *Briscoe* (which is nearly identical to the operative complaint in this case) stated a claim for relief under the PPPA. See *id.* at PageID.2698.

b. Magistrate Judge Altman held that PPPA claims are governed by the six-year statute of limitations in M.C.L. § 5813. See *id.* at PageID.2708-2714.

Magistrate Judge Altman also held that certifying the statute of limitations question to the Michigan Supreme Court was inappropriate under the circumstances. *Id.* at PageID.2716-2718.

c. Magistrate Judge Altman held that Michigan Executive Order 2020-58 and Michigan Supreme Court Administrative Order 2020-3 operate to toll the statute of limitations in the matter for 101 days. *Id.* at PageID.2715-16 (citing *Carter v. DTN Mgmt. Co.*, -- N.W.2d --, No. 360772, 2023 WL 439760, at *1 (Mich. Ct. App. Jan. 26, 2023)).

3. The proposed Notice of Supplemental Authority is attached hereto as Exhibit 1.

4. On March 3, 2023, counsel for Plaintiff contacted counsel for Defendant regarding concurrence in this motion. On March 3, 2023, counsel for Defendant provided its position regarding the Supplemental Authority at issue here. Following the filing of the original Motion for Leave to File a Notice of Supplemental Authority here, ECF No. 29, counsel for Defendant sent follow up correspondence indicating that Defendant, in fact, opposes the filing of this Motion—as such, counsel for Plaintiffs’ file this Corrected Motion to make Defendant’s position clear to the Court.

WHEREFORE, Plaintiff requests that the Court grant Plaintiff’s Motion for leave to file the attached Notice of Supplemental Authority.

Dated: March 7, 2023

Respectfully submitted,

/s/ E. Powell Miller

E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Drive, Suite 300
Rochester, MI 48307
Tel: 248-841-2200
epm@millerlawpc.com

Joseph I. Marchese
Philip L. Fraietta (P85228)
BURSOR & FISHER, P.A.
888 Seventh Avenue
New York, New York 10019
Tel: 646.837.7150
Fax: 212.989.9163
jmarchese@bursor.com
pfraietta@bursor.com

Frank S. Hedin
David W. Hall
HEDIN HALL LLP
1395 Brickell Avenue, Suite 1140
Miami, Florida 33131
Tel: 305.357.2107
Fax: 305.200.8801
fhedin@hedinhall.com
dhall@hedinhall.com

Counsel for Plaintiff and the Putative Class

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**BRIEF IN SUPPORT OF PLAINTIFF'S CORRECTED MOTION FOR
LEAVE TO FILE A NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiff should be granted leave to file a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 21) to Defendant's Motion and Brief to Dismiss (ECF No. 18)

Plaintiff Answers: Yes.

MOST APPROPRIATE AUTHORITY

- *Briscoe v. NTVB Media Inc.*, Case No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023)

For the reasons set forth in the above Corrected Motion, Plaintiff, by and through the undersigned attorneys, requests that the Court grant Plaintiff's Corrected Motion for Leave to File a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 21) to Defendant's Motions to Dismiss (ECF No. 18) (proposed notice attached as Exhibit 1 to Plaintiff's Motion).

Dated: March 7, 2023

Respectfully submitted,

/s/ E. Powell Miller
E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Drive, Suite 300
Rochester, MI 48307
Tel: 248-841-2200
epm@millerlawpc.com

Joseph I. Marchese
Philip L. Fraietta (P85228)
BURSOR & FISHER, P.A.
888 Seventh Avenue
New York, New York 10019
Tel: 646.837.7150
Fax: 212.989.9163
jmarchese@bursor.com
pfraietta@bursor.com

Frank S. Hedin
David W. Hall
HEDIN HALL LLP
1395 Brickell Avenue, Suite 1140
Miami, Florida 33131
Tel: 305.357.2107
Fax: 305.200.8801
fhegin@hedinhall.com
dhall@hedinhall.com

Counsel for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2023, I electronically filed the foregoing documents using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

/s/ E. Powell Miller
E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com